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No. 882

In the Supreme Court of the United States

OCTOBER TERM, 1937

MARION H. ALLEN, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF GEORGIA, PETITIONER

v.

REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA

PETITION, BRIEF AND ARGUMENT FOR RESPONDENT

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PETITION, BRIEF AND ARGUMENT FOR RESPONDENT

PETITION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The decision in this case is bound to be of the utmost importance to the State of Illinois, and to every state-owned and operated college or university in the land. If it be held that the admission taxes, authorized under Section 500 of the Revenue Act of 1926, as amended by section 711 of the Revenue Act of 1932, must be collected by the University of Illinois, that institution, and, through it, the State, will be subjected to a burden, both direct and substantial.

The Attorney General of the State of Illinois, therefore, respectfully petitions that the accompanying brief be filed in this cause in his behalf as *amicus curiae*.

OTTO KERNER
Attorney General of Illinois
SVEINBJORN JOHNSON
Special Assistant to the Attorney General

BRIEF OF AMICUS CURIAE

LEGAL PROPOSITIONS

Amicus curiae will, in this brief, concern himself chiefly with two propositions: *first,* the public competitive athletic contest, such as a football or a baseball game, is a proper part of the educational program of the State of Georgia, and is, therefore, a governmental function when all the circumstances of the instant case are considered; and *second,* Congress is without power to lay upon any State governmental agency the substantial burden of collecting the admission taxes described in Sec. 500 of the Revenue Act of 1926, as amended by Sec. 711 of the Revenue Act of 1932.

Amicus curiae also contends that education through a State university is a governmental function, and *assumes* that the University System of Georgia is a governmental agency of that State.

PRELIMINARY STATEMENT OF PRINCIPLES

As ground work for the main argument, it seems advisable to state certain principles so generally accepted that no extended reference to adjudicated cases is necessary. This Court has heretofore held that:

1.

There is no power in the national government to tax, or impose direct burdens upon, or embarrass such instrumentalities or agencies of the States as are used in the performance of strictly governmental

functions. That a like prohibition as against the States and in favor of the Federal Government exists has become a truism. Collector v. Day, 11 Wall. 113, 124; Brush v. Commissioner, 300 U.S. 352; and the principle is not affected by the *amount* or *quantity* of the burden. United States v. California, 297 U.S. 175;

a. This prohibition is none the less efficacious because implicit, rather than expressly stated, in the federal Constitution; for that which is implied is as much a part of the instrument as that which is expressed. South Carolina v. United States, 199 U.S. 437; Collector v. Day, supra; Clallam Co. v. United States Sprtice Corp., 263 U.S. 344;

b. The taxing power of the national government, in so far as there has been a grant of such power, is without limit; it may be exercised in such a manner as to "embarrass and destroy" the subject-matter of the tax, and the courts are powerless to give redress for that reason alone. Austin v. Alderman, 7 Wall. 694. This grant of power, nevertheless, like every other power granted the national government under the Constitution, is subject to the implied limits stated under 1, and 1, a and b, supra.

> "The immunity is derived from the Constitution in the same sense and upon the same principle that it would be if expressed in so many words."

Clallam Co. v. United States Spruce Corp., supra; and

c. The doctrine of tax immunity has been admitted and enforced as essential to the preservation of our dual system of government. Helvering v. Powers, 293 U.S. 214. Unless this political principle is to be abrogated by judicial decree, there can be no further extension of the rule applied in Helvering v. Mountain Producers Corp.,____ U.S.____, 58 S. Ct. 623.

2.

The University System of Georgia is, in the aggregate, an instrumentality of the State created for the more effective execution of a strictly governmental function (of providing the means of higher education for the people of the State), and all property and income received, used for the purpose of administering the System is beyond the direct, as distinguished from remote and incidental, exertion of the federal taxing power, to any extent or in any degree.

3.

The distinction between governmental and proprietary functions has become a basic doctrine in at least two important branches of the law, namely, tort liability and tax immunity of governmental agencies. One of the first cases in which the concept was applied is Lloyd v. City of New York, 5 N.Y. 369 (1851). At page 374, the Court said public corporations possess two kinds of powers:

> "* * * one governmental and public, and to the extent that they are held and exercised, is

clothed with sovereignty—the other private, and to the extent that they are held and exercised, is a legal individual. The former are given and used for public purposes, the latter for private purposes. While in the exercise of the former, the corporation is a municipal corporation, and while in the exercise of the latter, is a corporate, legal individual."

This Court, in South Carolina v. United States, supra, invoked the formula and held that an agent of the State, in conducting a liquor dispensary system, was performing a proprietary rather than a governmental function and was, accordingly, subject to the federal excise laws. It was also applied in Brush v. Commissioner, supra (1937).

4.

This brief is written upon the theory that the distinction, pointed out under 3, supra, between governmental and proprietary functions of the States, expressly applied in the cases above described and by necessary implication in Helvering v. Mountain Producers Corp., supra, is still valid in this Court. *If this doctrine is to be abandoned, the schools should be the last, not the first, to feel the full impact of the blow.*

THE ARGUMENT

I

Conducting a University is a Governmental Function

That education is a governmental function is no longer seriously debatable. It is assumed without dis-

cussion in Coronado Oil Co. v. Burnet, 50 Fed. (2d) 998.

Attention is called to a volume by E. W. Clews, entitled Educational Legislation and Administration of the Colonial Government, an authoritative historical work. Without going into detail, we are told that the Massachusetts Colony, fully one hundred years before the Constitution was adopted, expended public funds for the promotion of higher education; that in Connecticut, as early as 1715, public property and funds were appropriated for the advancement of college education; in New Hampshire, in 1693, and again in 1719, provision was made for the support of education through public taxation; and in Rhode Island, on February 17, 1764, the Legislature passed an act for the incorporation of the schools, in which it was averred, among other things, "Every wise and well regulated state" gives attention to the spread of knowledge among the people. This act pertained to *higher education*, as well as to the primary subjects. In New York, in 1764, Kings College was founded by a public act. In 1740 the City of Philadelphia appropriated twelve hundred pounds, and one thousand pounds annually for a period of five years, for the support of an academy. In New York State likewise, as early as 1737, public funds were appropriated for the teaching of Latin, Greek, etc.

It thus appears that higher education was supported by general taxation in some colonies more than a century before the Constitution was adopted, a fact

fully appreciated by the gentlemen who framed that instrument in Philadelphia in 1787.

It is improbable that a single leader of the movement for independence, or a single framer of the federal Constitution, did not believe firmly in the imperative necessity, not only of widespread popular education, as afforded by the common schools, so-called, but in the need for seminaries, colleges and universities operated by the State at public expense for the dissemination of knowledge in the higher branches. The federal Constitution is silent on the subject of a National university and upon the subject of education from no want of appreciation of its importance; the framers of that instrument came from States which had taken steps to maintain a school system at public expense, and they rejected the proposal to found a National University, for the reason, as pointed out by Roger Sherman in a debate in Congress later (Farrand, Proc. Const. Convention, Vol. III, Appendix A, CCLV, p. 362), that it was deemed to be the peculiar concern of the States. At the time of the adoption of the instrument the States had taken definite steps in the direction of promoting popular and college education at public expense. *The power was consciously reserved by the States.* The conducting of a school is an old governmental function, and in order to equip young men most fully for life and its work, it has recently become necessary to carry on this new activity—the football game—in order to perform the function fully. This seems good

sense and good law. Any other rule would deny the possibility of change or progress in the use of *means* or *methods* for the more adequate execution of traditional governmental powers. The conclusion seems to be inescapable that at the time of the adoption of the federal Constitution in 1787 the conviction was general that education was essentially an interest of the States and control thereof a governmental function.

In conclusion: Control over education was deliberately and consciously reserved to the States as a function of government and not granted Congress or the new nation. Applying the reasoning in United States v. California, supra, in respect of the control over commerce, this reservation by the States of control over education excludes the idea that the Federal Government can now challenge the right of the States to embrace higher education among their functions. Moreover, having reserved control over education, the States are free to adopt the programs and choose the means for making this power effective, and such programs and such means are *prima facie* governmental functions.

In Brush v. Commissioner, supra, the Supreme Court held that education through the elementary schools is clearly a governmental function. The court said:

> "Certainly, the maintenance of public schools * * * * calls for the exercise of governmental functions."

57 S. Ct. 500.

Under the doctrine recently announced by the Supreme Court in Brush v. Commissioner, supra, and United States v. California, supra, long and uninterrupted usage on the part of the States—in this instance antedating the Constitution—in embracing the operation of a university, for the imparting of knowledge in the higher branches of learning, within the sphere of governmental functions and to support the same by resort to the taxing power, removes from the domain of serious controversy the proposition that higher education is a function of the State government and is not proprietary in character.

> "Hence we look to the activities in which the States have traditionally engaged as marking the boundary of the restriction upon the federal taxing power."

United States v. California, supra, 56 S. Ct. 424.

II

The Public Competitive Athletic Contest is Properly a Part of the State's Educational Program

The attack in the instant case is directed against public competitive or intercollegiate athletic contests in general, and the football contest in particular, and it is claimed that these are not necessarily or reasonably a part of the educational program of a State university. From this premise it is reasoned that while education in the interests of health and calculated to develop the physical body, is properly a part of the educational program and, therefore, a func-

tion of government, the intercollegiate contest, especially the intercollegiate football game, is not and is rather a commercial or proprietary venture.

Against the narrow view of public competitive athletic contests we offer the testimony of the highest authorities in the field of physical education. These men speak out of years of experience and observation, while those who criticise intercollegiate athletic contests usually speak from theory. In the Illinois Agriculturist for November 1909 George A. Huff, late Director of Athletics at the University of Illinois, and in his time the most widely known and generally respected director of physical education in the country, said:

> "Much can be said from a physiological standpoint against the competitive side of athletics, but where one man may be induced to overdo in competition, hundreds of others develop that fighting grace, and that stick-to-it-iveness which they might never have attained, and which in after life has often proved the key to their success. I have watched men on the athletic field who were in all senses cowards, fearing fatigue or physical injuries, and I have seen them develop into fearless, aggressive and manly men, fit for the struggle of life * * * * "

Speaking of athletics at Illinois from the purely commercial standpoint, Mr. Huff continued:

> "Athletics at Illinois support themselves. The State gives no appropriation to sustain

athletics. They do not make money, for the Athletic Association is constantly putting into permanent improvements on Illinois Field all of its yearly surplus, if there is any* * * * *"

Such is the general history of athletic income throughout the country. Whatever receipts there may be from these contests are turned back into the treasuries of the State institutions, to be used by them for still further advancing the cause of education, physical, mental and moral.

In his book, Illinois, Allan Nevins, of Cornell University, New York, Oxford University Press, 1917, page 298 ff., says:

"To say that athletics receives a rare degree of attention does not mean that under the circumstances it takes an undue part of the student's time. The undergraduate, with little of the theatre, no excursions, no town dinners, and few concerts, naturally looks forward with eagerness to the football games or baseball matches that give him a regular Saturday afternoon thrill. The Homecoming and Interscholastic activities are centered in the football game and the baseball and track contests, respectively, and in these the presence of thousands of alumni and other visitors help to generate a wildly exciting interest * * * * But this interest in a half dozen baseball and as many football contests is thoroughly healthy, for it takes little time and it in no way militates against the general participation of students in athletic activities of their own

> * * * * The teams usually practice on Illinois Field, and the inexpert have the wide south campus to themselves. On fine days it is inspiring to see this stretch alive with class teams, fraternity teams, literary society and other club teams, and teams informally mustered * * * * In this connection it must be said that no students have for many years left without appreciation of the services to the whole institution of George Huff, not merely as efficient director of athletics, but as a man whose influence upon the moral standards of members of the University teams has been of the highest sort."

Mr. Huff regarded "the spectacular athletic victory" as a symbol of the general health and vitality of the student body. In the Topeka Daily Capital of December 15, 1924, the writer, speaking of George Huff, says,

> "That intercollegiate athletics today is not 'wagging the dog' was another of his statements. Mr. Huff believes all the energy used, all the money expended, worthwhile since in the development of major sports—which approach gate receipts approaching fabulous proportions—make possible the development of a program looking to the inclusion of every college student in intramural sports * * * * "

The fact is that the receipts from the competitive contests make possible intramural athletics, a sound and valuable educational asset in our schools.

It is obvious that to speak of the receipts from these

intercollegiate contests, such as football, basketball, track meets and the like, as "profit" in the usual business sense, is erroneous. The public, it is true, pays fees to witness these contests, but these fees are turned right back into the educational plant and devoted entirely to non-profit enterprises, namely, the physical or general education of students. In John L. Griffith's book, The Big Ten Book of Athletic Events, Chicago, C. B. Hopkins, 1929, p. 51 ff., we find the following typical statement concerning the use to which receipts are put:

> "A large part of the Illinois football profit is being used for the development of *intramural athletics.* More than $55,000 was recently expended for installing floors, walls and ceiling in the West Great Hall of the Memorial Stadium to make it available for intramural basketball, volleyball or handball courts. The Athletic Association will next erect an artificial ice skating rink at a cost of probably more than $300,000."

We may add that that has been done, and the ownership, control and operation of the skating rink is in the Board of Trustees of the University of Illinois, which, under the decisions of the Supreme Court of that State, holds title to all property for the people of the State of Illinois; and the State Auditor lists the same as property of the State. Minutes, Board of Trustees, University of Illinois, May 23, 1928, p. 614.

In Sixteen Years at the University of Illinois, 1904-

1920, University of Illinois Press, Urbana, p. 182 ff., we find the following statement among other things,

> "Intercollegiate competition is maintained with each of the other universities of the western conference * * * * It is the general belief at the University of Illinois that intercollegiate athletics can be maintained without interference with the intellectual interests of the general student body; while so far as the contestants themselves are concerned, whatever has been acquired in the way of physical prowess, moral training, finds its surest test in the intercollegiate game."

As early as 1895 the presidents of various midwestern universities met and drew up a series of rules which became the foundation of the present rules of the Big Ten Conference in the Middlewest, resulting in the total elimination of professionalism and the making of the teams representative of the student body. No man delinquent in his studies is permitted to play in these contests. Inasmuch as it is a signal honor to be a member of a competing intercollegiate team, this ambition to make the team is a constant stimulus to closer attention to studies and to better scholarship. This is wholly ignored by the dissenting judge in the Circuit Court of Appeals, and by those who attack the public competitive contest. See Appendix E.

In the Chicago Tribune, January 9, 1923, Hugh Fullerton said, among other things,

> "The full program of physical education, intercollegiate athletics, intramural athletics, and training of athletic coaches, proceeds as part of the plan of education of the boys and girls of the State."

It should be noted that a similar plan has been adopted in all the leading schools and colleges of the land. Intercollegiate or public competitive athletic contests are now and for years have been an integral and essential part of the entire program of athletic education in our higher institutions of learning.

The same author, Hugh Fullerton, in the Chicago Tribune, on January 9, 1923, writing with special reference to George Huff, said:

> "He believes in athletics, in intercollegiate contests, in football, if properly safeguarded—and in Illinois. Nor does he hold with the theory of the academic professors who oppose sport, especially football, but explains gently that our whole system of education is founded upon the Greeks, and that some of the academics are inclined to forget that the Greeks included athletics and sports in their educational scheme."

Again this author says in the same article,

> "I wish all the folk in Illinois could see what this school is doing for their sons and daughters. Anyone opposing athletics, objecting to football as 'foolish,' who visits Illinois and sees men and women being made sound, strong, and graceful, will change views. Incidentally,

> I was informed by several of the athletic department that they had never seen one faculty member ranking full professor, in the gym, save for big contests."

(We have been obliged, because of the very short time at our disposal, April 14-26, to make more extensive reference to Illinois than others, but the methods and attitudes are, as is commonly known, in all substantial respects identical in the universities and colleges of the country with respect to all matters material to the present inquiry. Of this the Court takes judicial notice because of the notoriety of the facts.)

III

Decision of State Authorities that Public Athletic Contest is Proper Part of Educational Program, Presumptively Correct

The dissenting judge seems to think that unless these "gladiatorial spectacles" (strangely, although the problem is general, reference is limited to football, though this is only *one* of *many kinds* of public games and contests sponsored by universities, far from "gladiatorial" in character, and to which admission is charged) " * * * * are an essential part of higher education" and the *Court*, rather than the State, so finds, and "as such governmental function" of Georgia, the enterprise of conducting a public game of football, baseball, basketball, a golf or tennis tournament, a hockey match, and the like, is proprietary and the principle of reciprocal immunity

from taxation of State or federal governmental instrumentalities is not applicable.

Two fundamentally erroneous assumptions support this view. *First:* it is not necessary to show that these contests are "an essential part of higher education"; it is enough that they appear, when reasonably and fairly viewed, appropriate parts of the *total* educational program, for, obviously, there is no *absolute* standard, known by man or revealed by God, by which to judge what is "essential" and what is merely reasonably appropriate and desirable. Some would regard Latin as essential, others as merely desirable, and still others as a waste of time. Judgments and opinions differ, but normally, of that difference of opinion this Court is not the arbiter. *Second:* the dissenting judge, able though he is, enunciates a dangerous fallacy, when he assumes that it is for the federal courts to decide, without regard to the local conditions or the decision of the local authorities, *what is* or *is not* an "essential part of higher education."

We believe the bar and the people of this country would be astonished were this Court to announce the bald doctrine that the agents designated by the State to frame educational curricula, are without power to set these up for their higher educational institutions, except subject to review and reversal by the federal courts in their uncontrolled or unlimited discretion. It seems plain that the most extreme doctrine which can be supported, in the light of prior decisions of this Court, is that while the *ultimate* power to decide

whether given activities in our schools are educational or proprietary, may be in the federal courts *when certain federal questions* are at issue, yet the decisions of the State authorities upon the question of what may be properly included in the curriculum, will be regarded as *prima facie* correct, and this Court is

> "not at liberty to interfere unless it is clear beyond reasonable controversy that rights secured by the Federal Constitution have been violated."

Green v. Frazier, 253 U.S. 233 (1920). See also Hoskins v. Commissioner, 84 Fed. (2d) 627. This principle *amicus curiae* regards of paramount importance.

In the case at bar the finding of the State authorities—including the courts of the State—that public competitive athletic events are a proper part of the State's educational program should not be disturbed by any court unless the conclusion be *clearly* unreasonable and *without substantial* support in *currently accepted educational theory or practice.*

We realize that the power of final decision as to immunity from federal taxation rests with this Court, but if, in order to decide that question, it becomes necessary to determine whether a given activity is properly, when fairly and reasonably viewed, a part of the *educational program* in a State owned and operated university, the decision of the *State* authorities upon that point is entitled to the highest respect, and in most cases would be controlling.

Otherwise, this Court substitutes its judgment, upon primarily non-judicial matters, for the judgment of specially trained persons chosen by the State for the purpose.

The principle is settled. In Green v. Frazier, supra, this Court laid down a rule of clear, sound and far-reaching implications. There the "New Day" (that is what it was called) program of the Non Partisan League was under attack. Various legislative acts involving the State in the business of building homes, operating banks, grist mills, creameries, etc., were challenged as contemplating the exercise of the taxing power for other than "public purposes" and, therefore, as taking the property of the citizen without due process of law. The people at a referendum, the legislature, and the Supreme Court of the State had concluded that these purposes were public, not private, and within the constitutional power of the people to support from the public revenues. This Court then states, in language above set forth, that the findings of the State and its agents upon these points of policy and judgment, will not be disturbed on appeal unless "beyond reasonable controversy" it appears that somebody's constitutional rights have been violated. In effect in this case, the United States claims its right and powers of taxation, granted it by the Constitution, have been violated because the State regards competitive athletic contests as proper parts of its educational program. On authority and principle, this conclusion of the State of Georgia comes clothed with

the highest presumption of correctness. In the case of Green v. Frazier, supra, this Court further and significantly said that

> "what was or was not a public use was a question concerning which local authority, legislative and judicial, had especial means of securing information to enable them to form a judgment * * * * "

How could this Court do otherwise? In forty-eight States conditions differ widely, and the local authorities are in a better position than this Court to "form a judgment" as to the proper content of the State's educational program. This Court said, in Noble State Bank v. Haskell, 219 U.S. 104:

> "In short, when the Oklahoma legislature declares by implication that free banking is a public danger * * * * this court certainly cannot say that it is wrong."

The dissent ignores the primary right and duty of the State to make these decisions respecting its own peculiar concerns; and the mere fact that the decision of the question in a particular way may, as a necessary legal incident, remove a certain activity from the field of federal taxation, does not affect the inherent right of the State to make such decision, when the activity represents a "usual governmental function." Helvering v. Powers, supra. For example, a *private* laboratory may be subject to a federal tax in a variety of ways, but if a State set it up in connection with its public health program, no one would

contend that the federal government could, under the decisions of this Court as they now stand, tax it in any form, merely because by going into this activity the indirect result is to remove something from the reach of the Federal taxing power. "Normally" every branch of public education is within the control of the State and is "not a departure from usual governmental functions." Helvering v. Powers, supra.

The sole question on this appeal is whether the decision of the authorities of the Georgia System to include public competitive athletic contests as a part of its higher educational program, is so clearly without support in sound or accepted educational theory or practice as to warrant a review with a contrary conclusion by this Court and a holding that the activities are indubitably proprietary and commercial rather than educational. This point was not considered by the dissenting judge.

It is the considered view of those who are responsible for planning educational programs for the University System of Georgia that the public competitive athletic contest is a proper part of the completed athletic educational process. It is possible to find differences of opinion upon this phase of the problem, but it certainly cannot be said to be clear "beyond controversy" that the inclusion of the contest is not proper. We have selected only one statement of policy in this behalf, but from the largest State and also one of the leading States in the field of education. The Regulations of the Regents of The University of

the State of New York on the subject are set forth in Appendix A. There the competitive athletic contest is recognized as a proper part of the State's program.

A volume could be written on the importance of athletics in the education of youth. Its importance is implicit in every sound definition of education. See Appendix B, the Seven Cardinal Principles of Education. All history shows that the culminating point in athletic training is some sort of public exhibition, or contest. From the most ancient times to the present, gymnastics have been regarded as a necessary part of education and at the great national festivals the chief attractions were contests in physical prowess.

IV

The Educational Value of the Public Competitive Athletic Contest

We refuse to be put on the defensive with respect to the merits of a part of the program of education in athletics commonly recognized in the best colleges and universities; and I regret the necessity of answering attacks upon a part of this program which emanate from sources obviously not fully informed about its essential character. We should hesitate to rest an argument in behalf of the football contest on nothing more authoritative than our own views, convinced though we are of its real educational and character-forming value. We are not left solely to speculation. Recently M. M. Thisted, Ph.D., made an extended study of the Relationship between Participation in

College Athletics and Vocational Success. The results of the survey are printed in the Research Quarterly of the American Physical Education Association, Vol. IV, No. 2, May 1933. Among the conclusions the following statements appear:

"2. Athletes and active alumni are found living in communities three times larger than those in which non-active alumni are living.

"3. There is a larger percentage of athletes with life insurance of $55,000 or above than there is of the other groups combined, although the median of all athletes is slightly less than that of the active group but greater than that of the non-active group. * * * *

"6. According to an arbitrary weighting scheme on number and make of car owned devised by the author, the athletic group has a higher success rating than either of the other groups. Of alumni whose scores on cars were seven or higher, ten were athletes, three were active, two were non-active.

"7. There is little difference between the median incomes of the three groups for the years 1925 to 1929. Of alumni graduating since 1920 the athletes are receiving today annual incomes considerably higher than either of the other groups. There appears also a tendency for a greater number of athletes to report incomes of 9,500 dollars or over than is true of non-athletes.

"8. The alumni who specialized in either basketball or football are now receiving larger

annual incomes than those specialized in track. * * * *

"10. There appears a positive relationship between the extent of participation in college athletics and financial success. * * * * "

Again, the author summarizes:

"The majority of educational, professional, and business leaders assign values to intercollegiate athletics. This estimate has been generally based on opinion alone."

For evidence bearing on the value of the intercollegiate contest, and the general aims of intercollegiate athletics, we refer to Appendix D of this brief. The Western Conference consists of the Athletic Directors of ten large mid-west universities (all State universities except two)—namely, Chicago, Illinois, Indiana, Iowa, Michigan, Minnesota, Northwestern, Ohio State, Purdue and Wisconsin.

Judge Hutcheson in his dissent refers to some practices in Georgia which he justly criticises. In this branch of education, as in all others, there are matters amiss which are an ever-present source of concern to school authorities until corrected. The evils referred to have been found to exist in many places, but in *all* places, Georgia included, strenuous efforts are constantly made to eradicate them. The decision in this case may be decisive of issues involving many colleges, and should not be rested upon such trivial matters as temporary abuses, which the State authorities are everywhere trying to remove, and in many States

have succeeded in correcting. I submit in Appendix E a few of the more pertinent rules of the Intercollegiate Conference, consisting of the schools above listed, as the best evidence of the high standards participants in these contests must attain. The printed volume cited is Rules, Regulations and Opinions of the Intercollegiate Conference of Faculty Representatives, Revised 1937, Athens Press, Iowa City, Iowa.

Those who have certain types of work to offer when the young man is through, other things being reasonably equal, would normally be expected to give preference to the man who was active in the competitive athletic contest. This is the current experience of the universities. We do not know what the record shows in the case of Georgia, as we have not seen it, but it is common knowledge—the Court may therefore notice it—that schools and even commercial enterprises favor, often specifically ask for, the letter man, that is, one who has participated in the intercollegiate contests, such as football, and the like. Nothing is more valuable in preparing a man to meet requirements for positions after graduation from the School or Department of Physical Education, than varsity football, basketball, track, swimming, baseball and wrestling. School principals and superintendents who deal with school boards, appreciate the fact that their athletic department is the public relations department of their school.

For a high opinion upon the value of competitive athletics from a source of unquestioned authority, I

refer the Court to Appendix C of this brief, where we have inserted a quotation from H. O. Crisler, of Princeton University, reproduced from the Research Quarterly of the American Physical Education Association.

Many authorities could be cited to show that education has numerous phases and that ideas regarding education, while many and varied, hold to certain fundamental tenets. One of these tenets is that the individual must be adapted to his environment, that he must be given certain training with which to better meet those conditions of life itself.

The seven cardinal principles of education are principles which attempt to meet all conceivable situations in society. Upon examination we find at least two of the seven principles have a direct concern with that phase of education which we have come to call athletics. These two principles are health and worthy use of leisure. See Appendix B.

Health and athletics have much in common. A well balanced individual must possess "a sound mind in a sound body." There are different ways to acquire a sound body, but the most effective, because it combines the values of physical exercise with the joys of sport and competition, is by participating in athletics. Hence, all phases of education, primary, secondary and higher, have conceived it one of their normal and important functions to provide facilities for and opportunities to participate in athletics.

The principle of worthy use of leisure and its connection with the field of athletics is one of tremendous social significance. We are, today, just beginning a realization of the consequences of a greatly augmented leisure. Life until a very few years ago seems to have consisted mainly in work. Due to changes in our economic life we find ourselves with a greatly shortened work day and week, and faced with a possibility of a considerably increased reduction from what we already have. "Idle hands breed mischief." We know that the problem of juvenile delinquency, crime and subversive political movements all have their roots in leisure which is not being properly used.

Athletics can and do play a major role in the leisure time problem. By encouraging participation in athletics, we occupy idle minds and body, recreate the individual so that he goes back to work with refreshed point of view, give our people the pleasure of enjoying games of skill and strength, carry them away from the cares and troubles of their every day existence. The public contests afford a fine opportunity for the student body to spend half a day—really a day—of leisure in wholesome surroundings.

It can be fairly stated too that athletics contribute toward the realization of two of the other principles of education, namely, citizenship and character. Citizenship is based upon the ability of an individual to fit into his particular society, to work, and to give and take with others. The athlete is trained in many of

these characteristics. While it is recognized that the training of character must be a continuous process, yet athletics is one of the few branches of education which has always undertaken its obligations in this respect. Sportsmanship and clean play are among its fundamentals.

Dr. Lotus D. Coffman, distinguished educator and President of the University of Minnesota, in speaking of the Minnesota athletic program, said:

> "He will discover that the athletic work is closely integrated with the teacher training courses, that the program is designed to give sound physical training to all who wish it (and in two units of the University, it is required), that intramural sports loom large, considering the numbers that participate, and lastly that the intercollegiate contests are part of a well-conceived and well-rounded athletic program."

Physical Education and Athletics for Men, University of Minnesota, 1937-1938, p. xiv.

Such is the view of many of our best known educators. Should the Courts reverse their judgment?

We think the educational value of the football and other commonly known public athletic contests is clear beyond serious controversy and that this Court should not overrule the judgment of the State authorities in this matter.

V

Some Points Concerning the Dissent in the Circuit Court of Appeals

The dissenting judge is an able jurist and the

rhetoric of his opinion is of the highest order. Respectfully we suggest he takes too narrow a view of the matter before him. He concerns himself solely with football, and he cannot envisage "the din and delight, the struggle and stress" as an "essential part of education" and, therefore, holds it not a governmental function. The dissent fails, it seems to us, in the very matter for which the author chides the writer of the majority opinion. Judge Hutcheson, speaking of his colleague's opinion, says,

> "With deference, he has not pointed, nor do I think he can point, to any practice, *precedent* or *principle* upon the basis of which it can be successfully maintained that the conduct of *intercollegiate football* games *for profit,* as is now the case in the football season, may be legitimately said to be a governmental function * * * * least of all a *function of higher education.*"

We refer to Appendix A, B, C, D and E, and main portions of this brief, in refutation of the points we have emphasized.

The dissent is notably free from close analysis of the legal question before the Court, or a searching examination of the facts with particular reference to educational theory and practice. Although all public competitive contests are necessarily involved, the author concerns himself only with the spectacular aspects of a football game. The opinion makes no mention of and therefore makes no attempt to explain

away the commonly acknowledged sound aspects of the public competitive athletic contest, including football games. It must be borne in mind that the tax challenged in this case is equally applicable to every competitive contest, whether football, golf, basketball, tennis, track or otherwise, if the admission tax exceeds the specified amount. It is a matter of common knowledge that the spectacular aspects described in the dissenting opinion in crackling rhetoric are totally absent from substantially all the other competitions mentioned. This opinion views a narrow segment of the problem, leaving the eye blinded to the larger aspects of the situation from the educational standpoint. The author of the dissent had before his eyes and was obviously influenced by only two considerations, namely, the large receipts and the glamorous and sometimes silly aspects of a football spectacle, when viewed from the side lines by the ubiquitous man from Mars. It is submitted that neither is of controlling importance upon the fundamental point at issue.

The dissenting judge says he cannot see the distinction between a football game for which the players are hired, and the ordinary college game. That is to say, he refuses to recognize a distinction between a professional football game in which the Chicago Bears and the Detroit Lions participate for pay, the proceeds of which are used for enhancing private fortunes, and a football game between the University of Illinois and the University of Michigan, the partic-

ipants in which are all *bona fide* students of the institutions named, who cannot play upon the teams unless they have achieved at least a minimum scholastic average, and who meet stringent requirements of health, character and intelligence, but receive no compensation whatsoever for what they do and the proceeds of which games are used to maintain general athletics at the institutions described. In the former case the participants appear solely for profit to themselves and others and are selected with that in view; in the latter case the contest represents the culminating point towards which the ambitions of these and other young men have been directed for years, and in the hope of attaining which they have deliberately sought not only high scholarship standards, but cultivated general excellence in every form of athletics. This contest, in which it is deemed a signal honor to participate, is precisely analogous to the intercollegiate debating contest towards which the members of the classes in English and in speech, and the members of the college debating societies, look as the ultimate honor as well as proof of skill. It is submitted that the distinction between the two types of football games is too obvious for debate. It is as plain as the difference between a college debate on the constitutionality and merits of the National Labor Relations Act and opposing arguments of paid counsel on the same act before this Court. There is probably some profit in the latter, while we know there is none in the former.

The dissent says the governmental immunity from taxation cannot reasonably be extended to "public exhibitions of the prowess of college football teams." Why not? *He* does not say. When the author of this dissent says that these exhibitions have as little connection with educational functions as a football team recruited from employees of governmental agencies, it is respectfully suggested that he is indulging in fantasy. Governmental agencies may organize basketball or football teams, but these contests do not represent, it is hoped, the ultimate ambition of the employees, as participation in these competitive athletic contests represents the ultimate ambition of many a college student as far as his college career in physical education or athletics is concerned.

The sum and substance of the dissent seems to be that any kind of a competitive contest between educational institutions attended by the public and for which privilege the public pays, is no part of an educational program, is in all cases proprietary, and therefore, like any proprietary activity, subject to federal taxation. In this view the author does not have the support of informed educational opinion in the United States.

The dissent speaks of "profit" but does not refer to the very substantial expense to which institutions are subjected in staging these competitive public contests, whether football or otherwise, and that a large part of the gate receipts goes to meet that expense. The importance of the association and interrelation of col-

leges and universities and of students in different States through these contests, is entirely ignored in the dissent. Cecil Rhodes, in defining the conditions of his famous scholarship plan, was definitely appreciative of this aspect of the matter as well as of the importance of a rounded citizen. The dissent, it is respectfully submitted, is wholly reactionary in its view of education, and shows an astonishing lack of understanding of the possibilities of athletic training and of the value of the culminating point of this training in the public competitive contest.

There is no profit, in the usual business or commercial sense, in any public competitive athletic contest, under the Georgia System, or elsewhere. The question of profit or loss has nothing to do with the problem whether these contests are properly a part of the educational program and, therefore, not proprietary. It is the *nature* of the activity that controls. This was conceded by counsel for the government in the oral argument in this Court of the case of Brush v. Commissioner, supra. In some years there is a surplus of receipts over expenses, which is, as is commonly known, turned back into the school fund and used for the maintenance of athletics and physical education. This surplus cannot, upon principles heretofore accepted as controlling, be burdened by a Federal tax. In Commissioner v. Ten Eyck, 76 Fed. (2d) 515, 519, the Circuit Court of Appeals for the Second Circuit said:

> "Even if the revenues were sufficient to pay back all the outlay of the State and the cities of the Port District for the construction of the port's facilities, the amounts over and above would go back into the treasuries of the cities for the reduction of taxes."

The common criticism of the football game centers largely around the behavior of the crowd. On this point, the dissent offers little that is new. True, the crowd comes together for no serious purpose and is in a holiday mood. Crowds do not always behave rationally, whether they have assembled to overthrow a government or enjoy themselves at an athletic competition. The writers of this brief have seen football crowds in all their irrational abandon; they have also seen the national conventions of the major political parties in the United States in action where the behavior of the delegates, when viewed from the detached viewpoint of the totally collected outsider, more closely resembled a free-for-all in a lunatic asylum than the supposedly serious business of nominating a candidate for President. Yet, I do not suppose that any one, whose opinion is worth a second thought, would deny that these conventions are necessary and proper adjuncts of representative government. The behavior of the crowd at a football game has little bearing upon the value of the contest to the participants or the student body.

We see debating teams from contending schools.

Young men reason strenuously and as best they can, in behalf of propositions in which, it may be, they do not believe; and the assembled crowd enjoys the evening—indeed, sometimes becomes noisy and unruly. The young debaters, like the young participants in the athletic contest, are not responsible for the behavior of the audience, for to them the occasion is serious because it represents the culminating test of the skill they have been cultivating, in their respective field of interest, for several years.

All of which simmers down to the point that the *spectacle* itself has very little, if anything, to do with the value of the contest *to the participants or the young students whose endeavors have been in the direction of winning a place on the teams;* and it is from *their* standpoint that this Court should consider the question of the propriety of including the public competitive contest in the State's educational program. In Bartels v. State of Iowa, 262 U.S. 404, Justice Holmes stated the proper criterion in concise language, when he said:

> " * * * * * it appears to me to present a question upon which men reasonably might differ and therefore I am unable to say that the Constitution of the United States prevents the experiment being tried."

The most that can be said is that the competitive contest divides opinion.

VI

The Non-discriminatory Tax Doctrine

Recently it has become fashionable, in an effort to whittle to imperceptible size the doctrine of inter-governmental tax immunity, to urge that a tax upon persons who contract with the Federal government, when assessed in the same manner as such taxes are assessed on such persons, or others similarly situated, then they deal with private persons, is non-discriminatory and should, therefore, be allowed. The adjective is deceptively simple and appealing in its superficial connotation, but when it is sought to make it the keystone of new doctrines of constitutional law, legal logic demands something more than plausibility of appearance or of sound. *The concept, if accepted in its literal latitude, as sometimes currently advanced and notably by Judge Hutcheson in his dissent, would permit the Federal government to tax directly the instrumentalities of the State itself, whether used in its sovereign governmental or in its proprietary capacity.* This theory, if loosely applied, is bound to involve ultimately the complete annihilation of the essential doctrine of dual-sovereignty, and there is implicit in it an abandonment of the heretofore accepted distinctions between governmental and proprietary functions. This result may or may not be desirable; we do not stop to argue that momentous question. We merely point out the inevitable consequences of the sanction of a new theory in our

constitutional system, which, in a limited and we believe wholly proper sphere, has received some countenance in this Court.

It is submitted that this criterion (non-discriminatory), if such it can be called, inevitably leads to the consequences suggested above. To illustrate: A non-discriminatory tax by a State on the income from securities, including therein federal bonds, is *directly* paid by the private owner, but as surely the *terms* on which the bonds sell are less advantageous than they otherwise would be, *by the amount of the tax,* or more. This every bond house and every experienced business man clearly understands. The tax is, therefore, paid by the government, if we look upon the realities with intellectual honesty. It may be that there should be no such exemption. That is a question of policy. The point I emphasize is that honesty and clear thinking, under the present Constitution, cannot sanction such a tax, on the theory that the government does not pay it in fact, although the tax statute may be so framed as to be wholly non-discriminatory.

Another illustration is the salaries of State officers and employees. To date they have been uniformly held immune from Federal tax. Yet the *individual pays* the tax under a general law taxing such income. We know, nevertheless, that salaries *must* be and are fixed with some regard for every day realities, such as the cost of living, and that an increase in this cost is sure *ultimately* to be paid by the government in the

form of increased salaries. The criterion is specious and unsound.

This Court reviewed many decisions in the recent case of Helvering v. Mountain Producers Corp., supra. It will be assumed, not only because of a well established principle, but because of the tremendous importance of the doctrine of immunity from the standpoint of the sovereignty of the States, that certain general language used in this decision will be read with close regard to the factual situation before the Court. The question was whether a corporation was subject to a federal income tax with respect to the amount of income received under a deed of trust to a certain corporation, executed by a lessee of State lands producing oil and gas. The question of the taxability of the salaries of State officers or employees, or of income, fees or collections of the States, was not involved. After discussing prior decisions, the Court said:

> "These decisions and a variety of applications enforce what we deem to be the controlling view—that immunity from non-discriminatory taxation sought by a private person for his property or gain because he is engaged in operations under a government contract or lease cannot be supported by merely theoretical conceptions of interference with the functions of government. Regard must be had to substance and direct effect and, where it merely appears that one operating under a

> government contract or lease is subjected to a tax with respect to his profits on the same basis as others who are engaged in similar businesses, there is no sufficient ground for holding that the effect upon the government is other than indirect and remote."

The language is broad enough, taken apart from the facts, to support the view that the *salaries* of *State officers* and *employees* are taxable by the Federal government, a result so revolutionary in its effect upon the sovereignty of the States, and so clearly contrary to a long line of prior decisions, that it is obvious this Court intended to announce no such doctrine. Yet it will later be urged by someone somewhere that such employees work under "a government contract" of employment, and this broad language will be invoked in support of a view this Court did not intend to advance, but will be asked to confirm.

Whether the views of the dissenting judge upon the wisdom of the *policy* of tax immunity influenced his judgment upon the law in the case, we do not know. If they did, we have no quarrel with him on that score. The late Justice Holmes said more than once that the courts legislated, and having been on both sides of the bar of justice, we are bound to agree that this is so. With the "test" of the validity of a claim for immunity from tax, suggested by Judge Hutcheson, whether viewed as a legislative or judicial proposal, however, we cannot agree. He says, after

stating his personal opposition to the immunity doctrine, that the

> "test * * * * should be whether the taxing statute discriminates against the government affected, and in favor of other taxpayers."

If the "non-discriminatory" tax doctrine means what Judge Hutcheson thinks it does, as evidenced by the above quoted excerpt, it is demonstrable that he proposed the total destruction of the dual principle, with a grant to the Federal government of the power to tax *State officers* upon their salaries, as well as the income of *each* State, from *whatever* source, on exactly the same basis as it *taxes* the incomes of *private citizens*. Such a tax on State income would not "discriminate" against the State. The State, of course, cannot discriminate against any citizen and tax him upon a basis different from that of other persons in the same class. The "test" suggested is no test, but the rule necessarily results from an abolition of the tax immunity—an abolition to which, we are sure, this Court will not consider giving judicial sanction without the fullest opportunity to every State in the Union to be heard against it and its revolutionary consequences.

How would this "non-discriminatory" rule, as Judge Hutcheson phrases it, work if applied to the States? It would follow unavoidably that *every* activity in which the State might engage would become taxable by the United States—just as this Court said of the liquor business in South Carolina v. United

States, supra. The federal government could require a license of certain or of *all* State and municipal employees; and it could require them to pay the usual income tax. It could levy an income tax upon all "corporations" from whatever source derived, and include in the definition of the term *corporation*, "the State and all political subdivisions," or it could classify corporations as public and private and assess different rates upon the members of each class. Such a tax would not be "discriminatory" in any legal or commonly accepted sense. It seems to us that the *entire principle* of immunity must be preserved to the States if the States and the nation are to survive and live together in mutual confidence and respect.

Will the new doctrine abrogate McCulloch v. Maryland, as well as Collector v. Day? Chief Justice Marshall, in the former case, was concerned only with the supremacy of the Federal Government, while in the latter this Court gave the States the benefit of Marshall's principle. Suppose the answer be *yes*, what would the results be? The Federal Government has expanded its activities into *every* State in the Union and gone into anything from vast power projects to local poor relief. Let us consider the power projects alone. Where the State tax is calculated on an *ad valorem* basis, certain States could collect from the Federal Government virtually enough revenue to make the tax on *private property* owners *nominal*. Imagine *forty-eight* States levying *"non-discriminatory"* taxes on the Federal Government, and the "ex-

panding needs of * * * * the nation" for more revenue would require the advocates of this theory to find sources much more lucrative than the schools and a few football games to stave off complete and ignominious bankruptcy. The plain truth is that the *whole principle* of *immunity* must be preserved to the Federal Government as well as to the States if that government is to survive, as Marshall demonstrated.

The "non-discriminatory tax" doctrine is a menace to State and national security, unless rigidly limited to the type of factual situations disclosed in James v. Dravo Co., ____U.S.____, 58 S. Ct. 208, and Helvering v. Mountain Producers Corp., supra. Extended beyond the factual situations there presented—really cases of independent contractors and not of State officers or employees—the doctrine becomes unsafe. As stated in the dissent, and as often glibly set forth by advocates, it would destroy the dual principle. *The respective rights and immunities of the Federal and State governments, the fundamentals of which are outlined in McCulloch v. Maryland and Collector v. Day, can and must be saved by insisting, as a minimum, that the exactions of one government shall not fall directly upon or burden the instrumentalities of the other, or discriminate against it.* Widened beyond the foregoing very brief statement, the doctrine is replete with danger and leads to the rejection of underlying principles essential to the maintenance of the essence of our present system. The facts in the instant case do not warrant the application of the rule

in any case heretofore decided in this Court, without extension beyond the limits of safety as far as our dual system is concerned.

VII

The Tax is a Direct Burden on the State of Georgia

The statute purports to levy this tax on the admission and requires the purchaser of the ticket to pay it. This, upon analysis, hampers the activities of the State in the execution of its work in connection with education. Let us instance a commonly known, useful, but not glamorous educational enterprise, the State Fair. Generally, the States charge admission, and on this the Congress could levy a tax if the Fair were not regarded as a function of the State government. Assume a ten per cent tax on admissions averaging 75 cents, and five persons to a family—a figure too low. The increased cost to the average family would be at least forty cents. A small sum—to the members of this Court and the authors of this brief—when viewed abstractly, but when we note the average income of the great *majority* of our people, an addition of fifty cents or seventy-five cents to the budget means more often than not to go without. Anyone who has had some concrete experience with the economic circumstances of large masses of our population understands this. Such a tax, then, would force the State to choose between the alternatives of *reducing* the *admission*, or of *denying* the *educational opportunities* of the fair to large numbers of the people.

Consider, again, the tax on admissions to the athletic contests. The recreational value, the sound use of leisure, incident to attendance upon the competition by non-participating students is not disputable. Everybody in any way connected with our State universities knows that hundreds of students go through college on a "shoestring"; that college authorities are constantly on the alert to discover cases of students who are undernourished and inadequately clothed because of poverty; and that to this marginal group of worthy and ambitious students the sum of *ten cents* measures the maximum they can afford to pay for perhaps two of the three meals a day—many go without lunch, trying to exist on a ten cent breakfast. These are matters of cold and cruel fact, commonly known in the educational world. To these young men and women ten cents added to a ticket—they cannot afford more than one event now and then—means, again, going without. The State, the institution, must choose between the alternatives of reducing the price and that of denying the recreational value of this use of leisure time to hundreds of its students. This Court can see, we are sure, that the burden of this tax, in the *circumstances*, falls directly upon a State activity or enterprise—is really a tax on the State, forcing it to carry on a governmental function at increased cost, or with less value to the people of the State chiefly concerned.

VIII

A Substantial Burden is Laid upon the State of Georgia without Its Consent

Should this Court hold that the admissions tax is not a burden on the State in its governmental capacity, or that the incidence of the tax is such as to be at most no more than an indirect and nominal burden, nevertheless the Federal Government cannot prevail because it is attempting to force the State of Georgia, without its consent, to serve as tax collector in its behalf. This is a real, not a fancied burden, and if the attempt be sustained by this Court, gives rise to implications of the most serious import. On this point Kentucky v. Dennison, 24 How. 66, is conclusive. There this Court held that Congress could not enforce a "duty of the executive" of a State to return a fugitive slave and said, if this could be done, Congress could disable this State officer "from performing his obligations to the State."

To collect this admissions tax from tens of thousands of persons requires that the State set up an elaborate and *costly* system of book and account keeping and of auditing. This is obvious. If the Federal Government can force the State to collect this tax, it can force it to collect the income tax, the Social Security tax, and every excise tax originating within its borders. The burden thus *imposable* would, in

the case of the economically weaker States, in some cases, at least, be too heavy to be borne. This is so plainly a violation of the principle of Collector v. Day and later cases, that no more time or space will be devoted to a discussion of the point. The Federal Government cannot embarrass "the lawful action" of the States (Railroad Co. v. Peniston, 18 Wall. 5), or in *any form* lay substantial burdens directly upon them.

Respectfully submitted.

April 20, 1938.

OTTO KERNER
Attorney General of Illinois

SVEINBJORN JOHNSON
Special Assistant to the Attorney General

APPENDIX A

REGULATIONS OF THE COMMISSIONER OF EDUCATION GOVERNING HEALTH AND PHYSICAL EDUCATION

Approved by the Regents of The University of the State of New York, at their meeting on July 30, 1937.

Appendix C to Journal of Regents Meeting, July 30, 1937

. . . . . .

ARTICLE V

PHYSICAL EDUCATION

Provisions for physical education or training

1 *Course of instruction*

The physical education or training program as required by law shall include instruction in the following types of activities in sufficient variety to meet individual pupil capacities, interests and needs: (1) mimetics; (2) rhythms and dances; (3) games; (4) calisthenics; (5) athletics; (6) self-testing stunts; (7) marching tactics; (8) dual combat; (9) gymnastics; (10) swimming where facilities are available; (11) and miscellaneous physical and recreational activities including winter sports

. . . . . .

5 *Athletic activities*

Effective September 1, 1938, athletic participation in all schools shall conform to the following regulations:

It shall be the duty of trustees and boards of education

a To permit no athletic team to represent a school except in conformance with the regulations

b To permit no postseason games or postseason tournaments, other than those conducted by school authorities in accordance with approved standards

c To prevent any individual or team representing a school under its jurisdiction from participating in a game or tournament which is not approved

d To insure satisfactory financial support for its program

e To approve all traveling of individuals of teams under their jurisdiction

f To maintain an equitable division of facilities between boys and girls

g To give primary consideration to the well-being of individual boys and girls in the conduct of games and sports

h To sacrifice no individual for the sake of winning events

i To conduct all activities under adequate safety provisions

j To equalize in so far as possible the powers of opponents in individual and group athletic competitions

k To provide adequate health examinations before participation in strenuous activity and periodically throughout the season, and to permit no pupil to participate in such activity without the approval of the school medical officer

l To make athletic activities an articulate part of the physical education program under the supervision of the professionally trained physical education staff

m To conduct all girls' athletic activities wherever possible under the immediate supervision of a woman physical education teacher

n To limit the girls' athletic program to club activities, intramural games, play days and approved invitation activities and to conduct all such activities for girls under girls' rules with women acting as referees, umpires or officials

o To require interschool athletic activities for boys, grades 9 to 12 inclusive, to be conducted in accordance with the following minimum standards:

. . . . . .

(4) *Extent of participation*

Football. Interschool competition in football shall be limited to a maximum of seven games a season. At least three weeks of training shall precede the first game. No game shall be played with college freshmen. All organized team practice and games shall be limited to the period between September 1st and December 1st. Interschool competition in football shall be permitted only in those schools which have 20 or more boys physically fit and eligible for participation. Competition shall be limited to boys enrolled in grades 9 through 12.

APPENDIX B

Cardinal Principles of Secondary Education, published by the Department of Interior, Bureau of Education, Bulletin 1918, No. 35.

"A report of the Commission on reorganization of secondary education appointed by the National Education Association main objectives of education. The Commission . . . . regards the following as the main objectives of education.

1. Health
2. Command of the fundamental processes
3. Worthy home membership
4. Vocation
5. Citizenship
6. Worthy use of leisure
7. Ethical character.*

These objectives apply to all education.

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*In education the above list of objectives are known as seven cardinal principles of education and are universally applied.

APPENDIX C

The Educational Implications of Intercollegiate Football by H. O. Crisler, Professor of Physical Education and Head Football Coach, Princeton University, from Research Quarterly of the American Physical Education Association, Vol. IV, March 1933, No. 1.

"In one individual the fifty or more instincts have different degrees of development. It is the duty of an educator to aid a boy in bringing all of his emotions to a normal, functional capacity. I presume our emotions are the most vital generative influence at the root of our behavior and yet very little effort is made to direct and guide them in the ordinary college subjects. It was some fifteen years ago that Dr. Joseph E. Raycroft invited attention to the strong emotional appeal in athletics and suggested that in football boys have their emotions trained and controlled, and consequently, 'the place and function of competitive athletics in an educational institution is much more important than commonly realized.' He further maintained that 'Participation in sports and games furnished the principle if not only the practical training in ethics that exists in our modern educational system.' So far as conventional instruction goes, there is slight appeal to the emotions—so slight in fact as to lead one to believe they are not a part of our mental equipment. It is difficult to find in any class room, exercises for the deep rooted passions that control our behavior in hate, desire, fear, anger, affection, joy, sympathy, courage, sorrow, or for the emotional experiences in our human conduct which have to do with community of effort, loyalty, sacrifice, risk, sense of fairness, rivalry, or self assertion. They are not without abundant display in the motor activity of football and the more direct the expression between emotion and motor action the more enriched is the educational experience. . . . .

"Intercollegiate football furnishes the splendid laboratory for emotional self mastery. In this game, as in many life situations, the emotions are the moving forces among men and through them of states and all society. Reason has very little to do with human action. Reason is simply a method of comparing and appraising, it is always used to justify what the emotions demand. . . . .

"Perhaps the most vulnerable point in our education system is the weakness in the very vital manner of training and harnessing our emotions. It is here that a wholesome football program is able to make a very significant contribution to the educational experience of a boy because play reverts to old foundations—to the very core of our being—and includes emotional experiences aforesaid mentioned. Athletics are practically our only hope in adequately directing emotions. Games such as football afford an opportunity to the youth of our nation to release such physical impulses by being doers of the action and not hearers and listeners only. Certainly we have a responsibility in education to direct boys in the right expressions in individual conduct and social relation. . . . .

"In the words of Chancellor McCormick, 'Athletics collegiate, intercollegiate and communal are a good thing and are worth a considerable amount of trouble in order that they may be made the best possible. Athletics should be as legitimate as Greek and as serviceable as ethics. We should no more think of enduring athletics than we should think of enduring biology and chemistry.' "

APPENDIX D

From ATHLETIC JOURNAL, Vol. VII, June 1, 1927, No. 10, P. 1.

GENERAL PRIMARY OBJECTIVES

Intercollegiate Sport in Western Conference
Adopted by Western Conference Athletic Directors, Madison, Wis. May 27, 1927.

1. To supplement and broaden modern education.
   In order to take full advantage of the opportunities of Intercollegiate sport to this end the entire I.C. Sport program should be made a definite part of the general educational scheme.
2. To promote the all around welfare of an increased number of participants.
   Physical—health—motor skills
   Recreational—pleasure in sport
   Increased "social insight"
   Social—gain greater acceptance, good will
   Moral and spiritual
   Strengthen essential attitudes and behavior through illustration and practice.
3. To strengthen by illustration and example individual university and public conception and practice of
   (a) Sportsmanship—group, sectional, national, international.
      1. Regard for player of adversary in victory or defeat
      2. Proper balance in victory
      3. Courage in defeat
      4. Fairness of attitude
   (b) Team play
   (c) Clean, healthful living

(d) True winning spirit—tenacity, honesty of purpose
(e) Self control
(f) Self confidence
(g) Citizenship
Respect for rules of games under stress
Respect for wise discipline and authority.
(h) Fortitude and courage

4. To develop group consciousness, morale, and spirit in the sense of loyalty to the institution and to fellow members of the college community.
5. Reflect through representation the spirit of the institution.
(a) Intellectual ability and achievement
(b) Moral tone and idealism
(c) Genuine sportsmanship through behavior and conduct.

SECONDARY OBJECTIVES

Of Intercollegiate Athletics for Western Conference

1. To serve as the peak of an all inclusive physical educational pyramid in opportunity for specialization and superior achievement.
2. To improve mental health for players and spectators by supplying wholesome absorbing interest.
3. To foster wholesome stimulating recreational opportunity for students, faculty, alumni and general public.
4. To provide opportunity for legitimate physical expression of "animal spirits."
5. To further the educational viewpoint and needs by securing and maintaining active interest of alumni and general public in the educational institutions through the field of greatest common interest and appeal.

6. To provide funds for adequate sports program for the entire student body.
   (a) Non-self-supporting competitive sports
   (b) Intramural sports—recreational activities
   (c) General physical education
   (d) Research in the field of physical education

WESTERN CONFERENCE

BRIEF CODE OF OBJECTIVES FOR I-C SPORT

1. To supplement and broaden modern education.
2. To promote the all around welfare of an increased number of participants.
3. To strengthen individual, university and public conception and practice of—
   Sportsmanship
   Physical well being
   Tenacity
   Citizenship
4. To develop group morale and loyalty.
5. To reflect through representation the tone of the institution.

Respectfully submitted,

J. L. GRIFFITH
E. E. WIEMAN
Dr. J. W. WILCE, *Chairman.*

APPENDIX E

RULES, REGULATIONS AND OPINIONS OF THE INTERCOLLEGIATE CONFERENCE OF FACULTY REPRESENTATIVES,

Revised 1937.

RULES OF ELIGIBILITY

Rule 1. Residence and Curriculum

Section 1. To become eligible to represent any institution in intercollegiate athletics a student must

(a) have been in residence therein one academic year.

(b) have completed therein one full year of work in addition to meeting the entrance requirements of the College of Liberal Arts of his institution or their equivalent.

(c) be bona fide matriculated and regularly enrolled as a candidate for a degree.

(d) be doing full work as defined by the regulations of the school or college, in which he is enrolled. * * * *

Section 2.

(a) In no case shall any student who has ever competed in interscholastic or intercollegiate athletics as a member of any other school or college team be permitted to participate in any intercollegiate athletic event as a representative of any Conference institution until after the close of the succeeding season devoted to the sport in which he last participated as a member of such other school or college team.

(b) In no case shall any student be permitted to take part in any intercollegiate contest until after his matriculation there shall have elapsed one full calendar year.

Section 3. In case a student leaves an institution of college grade and thereafter enters a Conference University and at the time of leaving the first institution he was delinquent in any of his studies or he was not otherwise in good standing, in order to become eligible he must be in residence two academic years as well as otherwise satisfying the requirements for eligibility. In no case shall any such transferring student be permitted to take part in any intercollegiate contest as a representative of the institution to which he transfers until, after his matriculation therein, there shall have elapsed two full calendar years.

Section 4. In case any member of the coaching staff of a Conference university shall have come to such institution after service as a member of the coaching or athletic staff of any other college, any student who has matriculated at such other college during the period of such coach's services there and who withdrew therefrom and thereafter matriculated at the Conference institution to which such coach transferred shall be ineligible for intercollegiate athletics.

Rule 2. Undergraduates

No student shall be eligible who

(a) has graduated from any school, college or department of a college or university, or

(b) has prolonged his undergraduate course for the purpose of extending his period of eligibility, or

(c) has sufficient credit so as to be eligible for graduation in the school or college in which he is enrolled.

Rule 3. Delinquency in Studies

Section 1. No student shall be permitted to participate in any intercollegiate contest who is found by the faculty to be delinquent in any of his studies.

Section 2. A student becoming ineligible through delinquency in studies may regain his eligibility by

(a) removing such delinquencies either (1) by thereafter repeating the courses in which the delinquencies were incurred and earning passing grades therein, or (2) by reexamination or otherwise, by which in accordance with college rules and practices the delinquency is erased, or (3) by thereafter taking and passing (except in the case of courses required for graduation) other courses of equal hours for which substitution permission has been granted, or

(b) thereafter doing one full year of work; to regain eligibility under (b) however, the student must have removed any delinquency which his college requires to be removed as a prerequisite to graduation. (Dec. 4, 1931)

Section 3. A student who has twice withdrawn from school with delinquencies may not regain eligibility. * * * *

. . . . . .

Rule 6. Compensation and Prizes

Section 1. No student shall participate in any intercollegiate contest who has ever used, or is using, his knowledge of athletics or his athletic or gymnastic skill for gain; (and this is also interpreted to cover the writing of single or syndicated articles of a technical nature); or who has taken part in any athletic contest in which a money prize was offered, regardless of the disposition made of the same. In case of minor infractions, prior to entering college, the Conference will entertain applications for reinstatement. * * * *

Section 4. No scholarships, loans or remissions of tuition shall be awarded on the basis of athletic skill, and no financial aid shall be given to students by individuals or organizations, alumni or other, with the purpose of subsidizing them as athletes or of promoting the athletic success of a particular University. (See also *General Regulation XIX*).

Rule 7. Outside Competition

Section 1. A student who after matriculation in any college engages in any athletic contest as a representative of any organization primarily athletic in character (as for example an athletic club), shall thereafter be ineligible to represent a Conference institution.

Section 2.

(a) A student who, after matriculation in any college, engages in any athletic contest during term time, other than the Summer Session or Quarter, as a representative of any person or organization other than his college, shall thereafter be ineligible to represent a Conference institution. (May 20, 1932)

. . . . . .

Rule 9. Athletes' Statement

Athletic Committees shall require each candidate for an intercollegiate athletic team to subscribe to a statement (standard blanks for the purpose to be furnished by the Conference) that he is eligible under the letter and spirit of the rules adopted.

Falsification of this blank will lead to a recommendation to the proper university authorities that disciplinary action be taken. (May 22, 1936)